

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of:)	
)	
)	CSR 5828-E
Time Warner Entertainment-Advance/Newhouse)	
Partnership, d/b/a Time Warner Cable)	
)	
Petitions for Determination of Effective)	
Competition in Hewitt and Woodway, Texas)	
(CUID Nos. TX0460 & TX0258)		

MEMORANDUM OPINION AND ORDER

Adopted: September 12, 2002

Released: September 18, 2002

By the Deputy Chief, Media Bureau:

I. INTRODUCTION

1. Time Warner Entertainment-Advance/Newhouse Partnership, d/b/a Time Warner Cable ("Time Warner"), filed with the Commission a petition pursuant to Sections 76.7 of the Commission's rules for a determination of effective competition in Hewitt and Woodway, Texas (the "Cities").¹ Time Warner also requests the revocation of the certification of the City of Woodway to regulate basic cable service rates due to the presence of effective competition. Time Warner alleges that its cable systems serving the Cities are subject to effective competition pursuant to Section 623(a)(2) of the Communications Act of 1934, as amended ("Communications Act"),² and the Commission's implementing rules,³ and are therefore exempt from cable rate regulation. Time Warner claims the presence of effective competition in the Cities stems from the competing services provided by ClearSource, Inc. ("ClearSource"), a franchised cable operator that also provides local exchange carrier (LEC) service in the Cities. No opposition to the petition was filed.

II. DISCUSSION

2. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition,⁴ as that term is defined by Section 76.905 of the Commission's rules.⁵

¹ 47 C.F.R. § 76.7.

² 47 U.S.C. § 543(a)(2).

³ 47 C.F.R. § 76.905(b)(4).

⁴ 47 C.F.R. § 76.906.

⁵ 47 C.F.R. § 76.905.

The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition is present within the relevant franchise area.⁶ Based on the record in this proceeding, Time Warner has met this burden.

3. Section 623(l)(1)(D) of the Communications Act provides that a cable operator is subject to effective competition, and therefore exempt from cable rate regulation, if a LEC or its affiliate offers video programming services directly to subscribers by any means (other than direct-to-home satellite services) in the franchise area of an unaffiliated cable operator, provided the video programming services are comparable to the video programming services provided by the unaffiliated cable operator in that area.⁷ The Commission has stated that an incumbent cable operator could satisfy the LEC effective competition test by showing that the LEC is technically and actually able to provide services that substantially overlap the incumbent operator's service in the franchise area.⁸ The incumbent also must show that the LEC intends to build-out its cable system within a reasonable period of time if it has not already done so, that no regulatory, technical or other impediments to household service exist, that the LEC is marketing its services so that potential customers are aware that the LEC's services may be purchased, that the LEC has actually begun to provide services, the extent of such services, the ease with which service may be expanded and the expected date for completion of construction in the franchise area.⁹

4. Time Warner is the incumbent cable operator within the Cities for purposes of the LEC effective competition test.¹⁰ Time Warner provided information showing that ClearSource is a telephone company that provides telephone exchange and other telephone services.¹¹ Therefore, ClearSource qualifies as a LEC for purposes of the LEC effective competition" test.¹²

5. In addition to qualifying as a LEC, ClearSource was awarded 15-year franchises for the provision of cable service within the Cities on April 17, 2000 and May 10, 2000.¹³ These franchises require completion of construction throughout the cities by mid-year 2007, subject to payment of liquidated damages and possible franchise revocation for non-compliance.¹⁴ Time Warner submits evidence that ClearSource has substantially completed construction of its cable facilities in both of the Cities.¹⁵ ClearSource has also distributed marketing materials within the Cities pointing out that residents need only call ClearSource for installation of its cable services.¹⁶

⁶ See 47 C.F.R. §§ 76.906 and 907.

⁷ 47 U.S.C. § 543(1)(1)(D); see also 47 C.F.R. § 76.905(b)(4). This fourth statutory effective competition test is referred to as the LEC effective competition test.

⁸ See *Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996*, 14 FCC Rcd 5296, 5305 (1999) ("Cable Reform Order").

⁹ *Id.*

¹⁰ Petition at 1.

¹¹ *Id.* at 2-3 and Exhibits A & B.

¹² See 47 U.S.C. § 543(1)(1)(D); 47 U.S.C § 153(a)(1).

¹³ Petition at 3-4 and Exhibit C.

¹⁴ *Id.*

¹⁵ *Id.* at 5 and Exhibit D.

¹⁶ *Id.* at 6 and Exhibit A (direct marketing letters, customer bill inserts, web site materials and channel line-ups from (continued...))

6. ClearSource's marketing materials show that its cable service offers over 100 channels of video programming that includes non-broadcast programming services such as ESPN, HBO, CNN, as well as a complement of local television broadcast stations, such as KCEN-TV (NBC), KXXV-TV (ABC), and KWTX-TV (CBS).¹⁷ This complement of programming services compares closely with the programming available on Time Warner's systems.¹⁸ Therefore, ClearSource provides comparable programming as required by the LEC effective competition test. Time Warner's petition also provides evidence that there are no regulatory, technical or other impediments to ClearSource's provision of cable service within the Cities, and that ClearSource is able to provide cable service that substantially overlaps Time Warner's service.¹⁹

7. Time Warner has also shown that ClearSource has commenced providing cable service within the Cities, is marketing its services in a manner that makes potential subscribers reasonably aware of its services, and otherwise satisfies the LEC effective competition test consistent with evidentiary requirements set forth in the *Cable Reform Order*.²⁰ Based on the foregoing, we conclude that Time Warner has submitted sufficient evidence demonstrating that its cable systems serving Hewitt and Woodway, Texas are subject to effective competition.

III. ORDERING CLAUSES

8. Accordingly, **IT IS ORDERED** that Time Warner's petition for determination of effective competition in the Cities of Hewitt and Woodway, Texas **IS GRANTED**.

9. **IT IS FURTHER ORDERED** that the certification of the City of Woodway, Texas, to regulate basic cable service rates **IS REVOKED**.

10. This action is taken pursuant to delegated authority pursuant to Section 0.283 of the Commission's rules.²¹

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Media Bureau

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various periodicals).

¹⁷ *Id.* at 2-3, 8 and Exhibit A.

¹⁸ *Id.* at 8 and Exhibit E.

¹⁹ *Id.* at 4-6 and Exhibit D.

²⁰ 14 FCC Rcd at 5305.

²¹ 47 C.F.R. § 0.283.